Office-Supreme Court, U.S.
FILED
MAY 31 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 949

JEWELL GABBARD LITTERAL AND LOUIS DYSON,
Petitioners,

vs.

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, A CORPORATION,
Respondent.

REPLY BRIEF OF PETITIONERS.

C. E. TATE,
Robeson Building,
Champaign, Illinois,
JOHN ALAN APPLEMAN,
The Maples,
Urbana, Illinois,
Attorneys for Petitioners.

JOHN ALAN APPLEMAN,
Of Counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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16 Appleman, Insurance Law & Practice, § 9210, p. 761	2

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For sake of clarity, all references to (App.) will be to the Appendix filed in the Court of Appeals, of which copies have been filed in this Court.

We quite agree with the decisions cited by the defense that if an insurance policy is unambiguous it will be construed as any other contract. And no authorities are cited by the defense upon any other point than this except that: 1. Waiver or estoppel cannot be used to create a new contract; 2. A policy provision against waiver prevents an effective estoppel, waiver, or modification by an agent. Let us dispose of these two points quickly and then return to the question of ambiguity.

If the defendant is sufficiently adroit to "hoist me by my own petard" by quoting from my set on insurance law,

then I do claim the privilege of being quoted accurately. As to point 2 above referred to, after pointing out that the parties at their pleasure may alter or modify any contractual provision or create rights by waiver or estoppel, the set goes on to discuss the effect of a "nonwaiver" clause, or attempt by the insurer by policy language to restrict contractual modifications to those made in writing endorsed on the policy by a company officer. And to quote exactly from 16 *Insurance Law & Practice*, § 9210, p. 761, it states:

> "A stipulation against oral waivers and requiring any waiver to be in writing and attached to the policy is, like any other policy provision, itself subject to waiver. Such stipulation is for the company's benefit, and may be waived by it. Such a waiver may be oral, or may be inferred from the acts or conduct of the insurer. The waiver of a nonwaiver provision may thus be implied by law from the conduct of an agent acting within the apparent scope of his authority."

In other words, not only is such a policy provision ineffective to accomplish the result claimed by the defense, but such provision may itself be waived orally or by conduct; and it is waived whenever an authorized representative acts inconsistently with the express policy terms but within the scope of his apparent authority. Many cases are cited in the footnotes to the above text, including Illinois authorities. So cited is *Phenix Insurance Company* v. *Grove*, 215 Ill. 299 at 302, 74 N. E. 141, the court stating:

> "The question whether there can be a waiver, not in writing, of a condition contained in a policy providing there shall be no waiver unless it is written upon or attached to the policy, arises on the demurrer to the second replication to each of the pleas. This question was decided in the affirmative in *Phoenix Ins. Co.* v. *Johnston*, 143 Ill. 106, *Phenix Ins. Co.* v. *Hart*, 149 id. 513, *Dwelling House Ins. Co.* v. *Dowdall*, 159

id. 179, *Phenix Ins. Co.* v. *Caldwell*, 187 id. 73, and *Orient Ins. Co.* v. *McKnight*, 197 id. 190. In those cases it was held that the stipulation in the policy that a waiver must be by an endorsement thereon was inserted for the benefit of the company, and, like any other condition of the policy for its benefit, might be waived by it. It is a just and reasonable rule that one who is authorized to waive a condition or provision of a policy by writing may also waive the writing. A provision that nothing less than an express agreement to be endorsed on the policy shall be effectual as a waiver is itself a condition, and is as capable of being waived and dispensed with as any other condition of the policy."

As to the claim that a contract cannot be created by waiver or estoppel, that was the error into which the defense misled the lower courts. We pointed out in our Petition in this Court that Illinois has for a century adhered to a doctrine which, under *Erie* v. *Tompkins*, the lower Federal Courts should have followed. That is, that where the parties have by their acts, statements, writings, or conduct placed an interpretation upon a contract, the courts will hold the parties to that interpretation. *E.g.*, *Walters* v. *Walters*, 409 Ill. 298 at 304, 99 N. E. 2d 342; *Weger* v. *Robinson Nash Motor Company*, 340 Ill. 81 at 91, 172 N. E. 7 at 11.

At no place has the defendant insurance company denied that Donald S. Bain was its "authorized representative" —the title borne by him in completing the accident report form (App. 29) for the purpose of certifying the existence of coverage. Indeed, the trial court expressly found that Bain was such an authorized representative (App. 17). The defendant company also states (Def's Brief, p. 23) that such report did not list the specific aircraft "for which the policy would provide passenger injury liability coverage." We regret that perhaps an excess of zeal led the

defendant into error here. The trial court expressly found (App. 17) as to this, as follows:

> "In this report it was stated that Dyson had a policy covering liability insurance for the injuries sustained by the crash of the Globe Swift aircraft. The insurance policy number listed in this report was the number of the aircraft policy."

When Donald S. Bain, as authorized representative of the defendant insurer, certified to the State of Illinois that defendant's policy covered the occurrence and protected the injuries to Mrs. Litferal, whether she be termed a guest, an occupant, or a passenger, that was the defendant insurer so certifying that fact as true. Its construction of the policy then is binding upon it now. In fact, defendant in its brief (p. 20) admits that: "The Respondent filled in and signed the foregoing accident report form and filed it with the Department of Aeronautics of the State of Illinois." Accordingly, it admits that the act of Bain was its act.

Indeed, let us go further. The defense states that it cannot be bound by estoppel. As we pointed out in our Petition, under Illinois law the defendant may be and is estopped from now asserting a position different than it asserted in its report to the State of Illinois. *Schmohl* v. *Fiddick*, 34 Ill. App. 150 at 198; *People* v. *Adams*, 65 Ill. App. 283 at 287. That doctrine of Illinois has not been challenged by the defense nor has any Illinois case been cited to the contrary.

And, under these circumstances, this makes particularly good sense. Let us return now to this "unambiguous" aircraft policy issued by the defendant insurer, and we will see why the only reasonable result is in favor of the plaintiff. To illustrate the utter confusion of the defend-

ant in its assertions, let us turn to page 12 of the defense brief. It is there stated:

> "The policy did provide other coverages, viz.: Bodily injury except to passengers (Coverage D) and property damage (Coverage F). Such coverages were afforded all aircraft owned or later acquired by Dyson. (App. 21.)
>
> "The policy did not, substantially, limit Dyson's use of aircraft for which Coverages 'D' and 'F' were afforded, since it recited several uses, including pleasure and business, Industrial Aid, Limited Commercial and Commercial.
>
> "The only apparent limitation as to the type of aircraft to be included under Coverages 'D' and 'F' is that contained in Item 5 (App. 21), referring to 'all N. C. licensed aircraft owned, operated, leased or borrowed, by the named-insured.' * * *
>
> "In the automatic attachment provision of the policy (App. 24) covering newly acquired aircraft, Dyson was to receive such coverages as were contained in the original policy schedule of coverages, *and nothing more*. Thus, Coverages 'D' and 'F' would automatically apply to newly acquired aircraft, but Coverage 'E' (passenger injury liability) would not apply unless specifically added by endorsement."

Now the insurer agrees that the various uses set forth in Coverage D are protected, including "pleasure and business, Industrial Aid, Limited Commercial and Commercial." Let us then turn to the cover sheet of that policy (App. 21) and see what those terms embrace.

We there find that these terms include protection for bodily injuries resulting from the "transportation of executives, employees, guests and customers." How, may we ask, may these persons be transported except inside the aircraft as occupants, by whatever name they may be called? Surely it is not contemplated that they will hang on to the wings or straddle the fuselage. And, further,

Coverage D embraces "instruction and rental to others" —in fact, all carriage "excluding any passenger carrying for which a charge is made." The term "instruction" contemplates the transportation of students who pay for this service; "rental" imports flight by persons who hire the aircraft for their own use and that of guests. In its definitions under Coverage D, the insurer excepts only "passenger carrying for which a charge is made"—in other words, the carrier situation where a greater duty is imposed by law upon the carrier.

Now, after the admissions upon page 12, which are in accord with our assertions, to the effect that the insured Dysoll was entitled to all this protection promised by Coverage D, the defendant insurer goes on to negate this on page 13 of its brief and following pages by using the term "passenger" as synonymous with "occupant".

We submit respectfully that such is no answer to the injured lady's contentions: If all occupants, although not paying for transportation nor occupying a preferential status with the insured charged with a legal duty as a carrier, are excluded from the policy protection—then what has happened to the protection the defendant admits on page 12 of its brief is owing under Coverage D? Has the protection promised for the transportation of executives, employees, guests, and customers suddenly become nugatory? Has the protection as to accidents occurring to students, renters, and their guests vanished?

Even the adroitness of the defendant insurer in drafting this nonstandard provision which it offered for sale to airport operators needing and wanting protection cannot make such an interpretation a reasonable one. The astute counsel who have long labored with this case cannot suggest any protection, under the defense theory, unless the craft crashed or exploded injuring a person on the ground

(Def's Brief, p. 17). The public has an interest in reasonable safeguards against airport hazards being insured, and clearly would and should expect more than this slim area of coverage as opposed to the vast uninsured areas which would be operative under the defense theory.

The defendant seeks to secure the result it desires by an adroit use of nomenclature. By repeatedly describing the plaintiff Jewell Litteral as a "passenger", defendant seeks to exclude her by invoking Coverage E (under which she does not claim). If she is a "passenger" merely because she rode in the aircraft with one who rented it, then is not every guest, every occupant, every student, every renter, indeed every pilot, a "passenger"? And, if this be true, then is not Coverage D, which they admit on page 12 of their brief protects against injuries to these very persons, superseded and made meaningless by Coverage E? We are chided for inappropriate humor, yet this is precisely the Amos and Andy type of coverage so often criticized by courts, lawyers, and laymen where the "big print gives it to you and the little print takes it away". This we deem to violate public policy. Illinois law demands that in such a situation a broad interpretation be given to the nature of the use insured. *Scott v. Freeport Motor Casualty Company*, 392 Ill. 332 at 345, 347, 64 N. E. 2d 542; *Wold v. Glens Falls Indemnity Company*, 269 Ill. App. 407 at 416.

As pointed out in our Petition (p. 16), Illinois law likewise demands that any possible interpretation be employed which will confer protection rather than to deny it. We are entitled to have this principle applied here. Coverage D, when applied for "commercial use" embraces every coverage except "passengers for hire"; and there has been no contention nor proof by the defendant that Jewell Litteral fell into that category.

The defendant makes an unfortunate statement upon

page 11 of its brief which could cause confusion. It there states:

> "Although Petitioner has referred in her Petition to the Globe aircraft as an 'after acquired aircraft,' the record is barren of any evidence that Dyson acquired this aircraft after the policy was issued (August 26, 1955) and prior to the accident (September 5, 1955)."

The inference would seem to be that perhaps this particular craft was not insured at all. Even had the defendant not so certified the fact of insurance to the State of Illinois, the policy itself covered (App. 11); "All N. C. Licensed Aircraft Owned, Operated, Leased or Borrowed by the Named Insured." And the trial court expressly found in its findings of fact (App. 9) that Dyson was on September 5, 1955, the owner of the above craft.

Therefore, we may lay aside the above assertion as being irrelevant to our consideration.

With reference to the airport policy, defendant states that plaintiff does not "seriously take issue with the decision" below. This is not accurate.

I was trained in the law in the belief that attorneys were officers of the court owing to it a duty of complete integrity. That obligation demands that where there are two divergent views both be fairly stated. The privileges of advocacy do not permit an unfair concealment of that situation.

In our brief, we pointed out that there are two views asserted by various jurisdictions where there is a public liability policy insuring against negligent acts but excepting or excluding a specific type of hazard. We went on, however, to point out that where the loss arises out of a type of negligence which is specifically insured, and there is also a type of conduct which is not insured, the majority

sof decisions still extend protection so long as the negligent insured act is in progress *provided such act helps to produce the injury.* We cited several illustrative decisions on this point in our Petition. The defendant cites not a single decision dealing with such a contract to aid this Court only a few cases mouthing general principles not of concern here.

Further, the defendant does not seek to distinguish *Boatwell* of any decision cited upon pages 18 to 20 of our Petition except *Moldovan.* And defendant's statement as to that decision, unfortunately, is not accurate. It infers that the policy in that case did not contain an excepted risk. Had defendant actually read that decision, it would have found that this involved a premises liability policy covering negligent acts arising out of the ownership, maintenance or use of described premises—precisely as Dyson's policy did here. There was a separate division of the policy (corresponding to the passenger coverage in Dyson's case) under which the insured could have purchased protection arising out of the acts of "Dogs and horses". This, however, the insured did not purchase. A dog owned by the insured escaped from the premises and bit the plaintiff on property adjacent to the insured premises. The court held that since there was a negligent act in failing properly to supervise the premises, permitting the injury to occur through escape of the dog, such act of negligence permitted recovery even though the instrumentality of injury was not insured. *Moldovan v. United States Fidelity & Guaranty Company,* 1959, 15 Misc. 2d 85, 184 N. Y. S. 2d 201 at 204, affirmed 8 A. D. 2d 607, 185 N. Y. S. 2d 735:

> "The criterion here is *not* the place where the ultimate act of injury was consummated, but is the place *where the act of negligence was initiated, originated or occurred.*" (Italics court's.)

The defendant's criticism of this decision, accordingly, is not well taken. Defendant does not attempt to distinguish the remaining authorities cited by us. Nor could it reasonably do so, because those cases support the view that where the negligence is continuing and helps to bring about the injury, a recovery may be had. But, again, to be completely fair, even though the defense apparently found no relevant authorities, there are decisions opposed to the view which we assert—although, in most of those cases, the active negligence insured against had ceased at the time and the injury resulted, in fact, from the inherent nature of the excluded risk.

In the instant case, it is not denied that the active negligence of the insured's employees in directing Schindler off an improper runway, with a cross-wind and high tension wires nearby, was an active, producing cause of the injury. We must also be critical of defendant for stating in its brief (p. 27) that the crash occurred some 500 or 800 feet from the airport. We have searched the Appendix containing the court's findings of fact and find no such statement, and it would seem that proper respect for this Court would not permit deviation from the record or findings of fact.

SUMMARY

We respectfully submit that under the undisputed facts the coverages here afforded by each policy covered the injuries to the plaintiff, Jewell Litteral, and requires the insurer to discharge the judgment rendered against its insured. If Illinois law is properly applied, we earnestly urge that no other view reasonably can be taken. And, in good conscience, this result is reasonable under the facts and under the prevailing law.

Wherefore, it is respectfully prayed that the petition for writ of certiorari be allowed.

Respectfully submitted,

C. E. Tate,
Robeson Building,
Champaign, Illinois.

John Alan Appleman,
The Maples,
Urbana, Illinois,
Attorneys for Petitioners.

John Alan Appleman,
Of Counsel.